1-584

July 18 Judgment

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~392.~~ 157

WALTER N. HALDEMAN, REUBEN S. DURRETT, AND JAMES V. ESCOTT, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED MARCH 13, 1874.

A. F. C.

Dam's Writs

SUPREME COURT OF THE UNITED STATES.

No. 392.

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INDEX.

	Original	Print.
Declaration	1	1
Summons	6	3
Marshal's return	6	3
Pleas	7	3
Demurrer	11	5
Judgment	14	7
Bond	15	8
Clerk's certificate	17	8
Writ of error	17	9
Citation and service	18	9

as allowed by the act of Congress hereinafter specially referred to and described, all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same has been or shall be credited by proper Department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make, the same as directed; and has done and shall do and perform all other duties as fiscal agent of the Government, which have been or may be imposed by an act of Congress, or by any regulation of the Treasury Department made in conformity to law; and also has done and performed, and shall do and perform, all acts and duties required by law, or by direction of any of the executive Departments of the Government as agent for paying pensions, or for making any other disbursements which either of the heads of these Departments may be required by law to make, and which are of a character to be made by a depositary constituted by an act of Congress entitled "An act to provide for the better organization of the Treasury, and for the collection, safe-keeping, transfer, and disbursement of the public money revenue," approved August 6, 1846, consistently with the other official duties imposed on him, then this obligation to be void and of none effect."

Now the plaintiffs in fact say that the defendant Walter N.
4 Haldeman has not faithfully executed and discharged all the duties of said office of surveyor of the port of Louisville, and of depositary of the public moneys intrusted to his charge; nor has he faithfully kept all of the public moneys which have come to his possession and custody and paid out the same as provided in the condition of the said bond or writing obligatory as aforesaid; nor has he performed the duties required of him as fiscal agent of the Government as aforesaid, according to law, but has failed in the following particulars, that is to say—

First. The plaintiffs aver that, on the day of A. D. 1861, and long before the commencement of this action, the said *William* N. Haldeman was removed from his said office of surveyor of the customs and depository of the public moneys of the United States, and that at the time of his removal as aforesaid there remained in his hands, and unaccounted for to the said plaintiffs, the sum of two thousand four hundred and ten dollars and ninety-one cents, ($2,410.92,) being for moneys received by the said Haldeman as depositary of the public moneys of the United States, and for moneys received by him as surveyor of customs for the port of Louisville, in the State of Kentucky, for customs and steamboat-fees, no part of which said sum of money has been paid or accounted for by the said Haldeman to the plantiffs, or any officer acting under or by their authority, although often demanded by the plaintiffs, through and by their authorized agents and officers.

Second. The plaintiffs further aver that, upon the settlement of the accounts of the said Walter N. Haldeman, late surveyor of the
5 customs and designated depositary at Louisville, K'y, made by the proper accounting officer of the Treasury Department, on the 24th day of August, A. D. 1866, there was found due and owing from the said defendant the sum of twenty-four hundred and ten dollars and 91 cents, all of which will more fully and at large appear by the duly-certified copy of the report of the First Auditor of the Treasury, numbered 157206, as admitted and certified by the Comptroller upon the account of W. N. Haldeman, late surveyor of customs and designated depository at Louisville, Kentucky, which is now here to the court shown, and which said sum of money, or any part thereof, has not been accounted

for or paid by the said defendant Haldeman to the plaintiffs, or to any person authorized to receive the same, although often requested so to do.

Third. And the plaintiffs further say that the defendant W. N. Haldeman wholly failed to comply with or perform the said conditions attached to said writing obligatory or either of them. He has failed to pay the aforesaid several sums of money, or either of them, or any part of either. Nor have the said William H. Walker, Reuben T. Durrett, Joseph Metcalf, and James V. Escott, or either of them, paid the said sums of money or either of them, or any part of either, but to pay the same the said defendants and each of them have wholly failed and refused. Whereby an action hath accrued to the plaintiffs to have and demand*ed* of and *and* from the said defendants the sum of fifty thousand dollars, yet although often requested, said defendants have not paid said last-mentioned sum of money or any part thereof, but to pay the same have refused and still do refuse and fail, to the damage of the plaintiffs five thousand dollars ($5,000,) wherefore they sue, &c.

G. C. WHARTON,
U. S. Att'y, K'y Dist.

6 Upon which declaration, the following process issued, to wit:

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby commanded to summon Walter N. Haldeman, William H. Walker, Reuben T. Durrett, Joseph Metcalf, and James V. Escott, if they be found within your district, to appear before the circuit court of the United States of America for the Kentucky district, on the first day of its next October term, to be held at the city of Louisville, to answer unto the United States of America on a plea of debt $50,000, damage $5,000; and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 30' day of August, in the year of our Lord 1870, and of our Independence the 95th.

[SEAL.] W. A. MERIWETHER, *C. C. C., K. D.*

Upon which process the marshal made the following return, viz: Executed the within process by delivering copies of the within to W'm H. Walker, Ja's V. Escott, on the 30th day of August, 1870, and on Walter H. Haldeman & Reuben T. Durrett, on the 31st day of August, 1870. Joseph Metcalf is dead.

H. CRITTENDEN, *Special Deputy.*
Per ELI H. MURRAY, *U. S. M., K. D.*

At a term of our said court held for its October term, 1870, to wit, on Tuesday, October 4th, 1870—

Came the defendants by Harlan, Newman and Bristow, their attorneys, and filed their pleas Nos. 1, 2, 3, and 4 herein.

The pleas above referred to are as follows:

7 United States circuit court, sixth circuit & Kentucky district.

WALTER N. HALDEMAN ET AL.
ats.
UNITED STATES.

And the said defendants, by their attorneys, Harlan, Newman & Bris-

tow, came and defend the wrong and injury, when, &c., and say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against said defendants, because they say that the said plaintiffs heretofore, to wit, on the 18th day of November, in the year 1861, in this honorable court, impleaded the said defendants in a certain plea of debt for the detaining and not paying the very same identical debt and for and in respect of the same identical cause of action in the said declaration mentioned; and such proceedings were thereupon had in this court, that afterwards, to wit, on the 17th day of June, in the year 1863, by the consideration and judgment of this court, and on motion of the said plaintiffs, said suit was dismissed upon payment to said plaintiffs by said defendants of the costs thereof, to wit, the sum of twenty-five dollars; and thereupon, by the further consideration and judgment of this court, it was adjudged that said suit was not prosecuted, as by the record and proceedings thereof still remaining in this court, more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed, modified, or made void; and this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain their aforesaid action thereof against them.

8 2nd. And for further plea in this behalf the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that, heretofore, to wit, on the 18th day of November, in the year 1861, the said plaintiffs exhibited and filed in this honorable court their declaration in debt against these defendants, wherein said plaintiff claimed and prayed judgment against these defendants for and in respect of the same identical debt, and for and in respect of the same identical cause of action in the said declaration now exhibited and filed mentioned; and such proceedings were thereupon had in this court that, afterwards, to wit, on the 17th day of June, in the year 1863, the said plaintiffs received and accepted from said defendants the sum of twenty-five dollars, lawful money of the United States, in full payment and discharge of the costs of said suit; and thereupon, on motion of said plaintiffs, and by the consideration and judgment of this court, it was adjudged and ordered that the said suit was not prosecuted and that the same be dismissed, as by the record and proceedings thereof still remaining in this court more fully and at large appears; which said judgment & order remains in full force & effect, not in the least reversed, modified, or made void; & this the said defendants are ready to verify, &c.

3. And the said defendants, for further plea in this behalf, say that the said plaintiffs ought not to have or maintain their aforesaid

9 action thereof against them, because they say that, heretofore, to wit, on the 18th day of November, in the year 1861, the said plaintiffs impleaded the said defendants in a certain plea of debt, in this honorable court, for the detaining and not paying the very same identical debt, and for & in respect of the same identical causes of action in the said declaration mentioned; and thereupon such proceedings were had that, afterwards, to wit, on the 17th day of June, in the year 1863, by the judgment of this court, said suit was dismissed, agreed as by the records & proceedings still remaining in this court more fully & at large appears; which said judgment still remains in full force & effect, not in the least reversed or modified; and this the said defendants are ready to verify, &c.

4. And the said defendants, for further plea in this behalf, say the said plaintiff ought not have or maintain their aforesaid action thereof against

them, because they say that, heretofore, to wit, on the 18th day of November, in the year 1861, the said plaintiffs in this honorable court impleaded the said defendants in a certain plea of debt for the detaining and not paying the very same identical debt, and for and in respect of the same identical causes of action in the said declaration mentioned; and also then & there the said plaintiffs impleaded the said defendants in another certain plea of debt for and in respect of another & different cause of action; and thereupon such proceedings were had in this court, that, afterwards, to wit, on the 17th day of June, 1863, by the consideration and order of this court, the following judgment was rendered, to wit: "This day came Joshua Tevis, esq., attorney for the United States, and stated to the court that he was instructed by the Solicitor of Treasury to dismiss the above two cases on the payment of costs herein by the defendants, and the clerk having taxed the costs at twenty-five dollars in each case; and the marshal having acknowledged payment thereof, on motion of said attorney it is ordered that these cases be and the same are hereby dismissed. It is therefore considered by the court that these suits are not prosecuted;" as by the records and proceedings still remaining in this court fully and at large appears; which said judgment still remains in full force & effect and unreversed; and this the said defendants are ready to verify, &c.

HARLAN, NEWMAN & BRISTOW,
For Def'ts.

And at another term of our said court, held for its February term, 1873, to wit, on Tuesday, June 17th, 1873—

Came the district attorney, came also the defendants, by B. H. Bristow & John M. Harlan, their attorneys.

The district attorney filed his demurrers to pleas Nos. 1, 2, 3, and 4, and the defendants their joinder in said demurrers.

The matters of law arising upon said demurrers were argued by said counsel, and the court not being fully advised thereof, takes time.

The demurrers above referred to are as follows:

Demurrer No. 1.

In the circuit court of the United States of America, for the sixth circuit, and Kentucky district.

UNITED STATES
vs.
W. N. HALDEMAN & OTHERS.

And the said plaintiffs, as to the said plea of the said defendant first above pleaded, saith that the same and the matters therein contained in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c., &c.

G. C. WHARTON,
U. S. District Attorney.

And the [illegible] like.

HARLAN & BRISTOW,
For Def'ts.

Demurrer No. 2.

In the circuit court of the United States of America for the sixth circuit and Kentucky district.

UNITED STATES
vs.
W. N. HALDEMAN & OTHERS.

And the said plaintiffs, as to the said plea of the said defendant second above pleaded, s*aith* that the same and the matters therein contained in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants; and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c., &c.

G. C. WHARTON,
U. S. District Attorney.

And the def'ts do*th* the like.

B. H. BRISTOW, &
J. M. HARLAN, *For Def'ts.*

Demurrer No. 3.

In the circuit court of the United States of America for the sixth circuit and Kentucky district.

UNITED STATES
vs.
W. N. HALDEMAN & OTHERS.

And the said plaintiffs, as to the said plea of the said defendants thirdly above pleaded, s*aith* that the same and the matters therein contained in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c., &c.

G. C. WHARTON,
U. S. Att'y Dist. of K'y.

And the def'ts do*th* the like.

HARLAN & BRISTOW,
For Def'ts.

Demurrer No. 4.

In the circuit court of the United States of America for the sixth circuit and Kentucky district, ss:

UNITED STATES
vs.
W. N. HALDEMAN & OTHERS.

And the said plaintiffs, as to the said plea of the said defendant fourthly above pleaded, s*aith* that the same, and the matter therein contained, in manner and form as above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c., &c.

G. C. WHARTON,
U. S. District Attorney.

And the def'ts do*th* the like.

HARLAN & BRISTOW,
For Def'ts.

14 And on another day of said term of our said court, to wit, on Wednesday, June 18th, 1873, came the district attorney and announced to the court the death of the defendant' William H. Walker and Joseph Metcalf; and, on his motion, it is ordered that the writ herein, as to said defendants, do now abate.

The court being now fully advised of and concerning the matters of law arising upon the demurrers herein, it seems to the court the law is for the United States.

It is therefore considered by the court that said demurrers be and the same are hereby sustained.

And at another term of our said court, held for its October term, 1873, to wit, Tuesday, October 21st, 1873, came the district attorney; came also the defendants, by Bristow & Harlan, their attorneys.

On motion of the district attorney, and the defendants saying nothing further in bar or preclusion of plaintiffs' demand, it is therefore considered by the court that the plaintiffs, the United States of America, recover of the defendants, Walter N. Haldeman, Reuben T. Durrett, and James V. Escott, the sum of fifty thousand dollars, the debt in the declaration demanded to be discharged by the payment of such damages as the plaintiffs have sustained by reason of the breeches in the condition of the writing-obligatory declared on, and which are assigned in their declaration, and such other damages as the plaintiffs may have sustained by reason of any other breech in the condition of the
15 wiriting-obligatory, which may be hereafter assigned; and because the damages which the plaintiffs have already sustained may be computed, it is ordered that the clerk do make the computation thereof.

And thereupon the clerk reported that he had computed said damages, and that they amounted to three thousand four hundred and forty-six and $\frac{40}{100}$ dollars.

It is therefore considered by the court that the plaintiffs, the United States of America, have execution against the said defendants, Walter N. Haldeman, Reuben T. Durrett, and James V. Escott, for said sum of three thousand four hundred and forty-six and $\frac{40}{100}$ dollars, with interest thereon at the rate of six per centum per annum, from the 21st day of October, A. D. 1873, until paid; also their costs herein expended.

And afterwards, to wit, on the 29th day of October, 1873, came the defendant W. N. Haldeman and J. V. Escott, by John M. Harlan and B. H. Bristow, their attorneys, and filed in the clerk's office of our said court their bond therein.

The bond above referred to is as follows:

Circuit court of United States, sixth circuit and district of Kentucky.

UNITED STATES
vs.
W. N. HALDEMAN ET AL.

Know all men by these presents that we, W. N. Haldeman, J. V. Escott, and Isham Henderson, are held and firmly bound unto the above-named United States of America, in the sum of six thousand eight hundred and ninety-two $\frac{80}{100}$ ($6,892.80) dollars to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severaly, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 29th day of October, A. D. 1873.

Whereas the above-named W. N. Haldeman & J. V. Escott hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the circuit court of the United States for the district of Kentucky, sitting at Louisville, against the said W. N. Haldeman & others, in the case of The United States of America vs. W. N. Haldeman and others:

Now, therefore, the condition of this obligation is such, that if the above-named W. N. Haldeman and J. V. Escott shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. N. HALDEMAN. [L. S.]
J. V. ESCOTT. [L. S.]
ISHAM HENDERSON. [L. S.]

Taken and acknowledged before me this 29th day of October, A. D. 1873.

W. A. MERIWETHER,
Clerk Cir. C't U. S., K. D.

Approved by—

BLAND BALLARD

DISTRICT OF KENTUCKY:

I, W. A. Meriwether, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do certify that the foregoing 16 pages contain a true and complete transcript of the record and proceedings had in this court in the case mentioned in the caption.

Witness my signature and the seal of said court this 31st day of January, A. D. 1874.

[SEAL.] W. A. MERIWETHER, *Clerk.*
By SAM. B. CRAIL, *D. C.*

UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States of America, plaintiffs, and Walter N. Haldeman, Reuben T. Durrett, and James V. Escott, defendants, a manifest error hath happened, to the great damage of the said Walter N. Haldeman, Reuben T. Durrett, and James V. Escott, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the first day of our next October term in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable N. Clifford, associate justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this 22d day of October, A. D. 1873, and of the Independence of the United States the 98th.

[SEAL.] W. A. MERIWETHER, *C. C. C., K. D.*
Allowed by—

BLAND BALLARD.

(Indorsed:) 1779. United States vs. W. N. Haldeman et al. Writ of error. W. N. Haldeman et al. vs. United States.

18 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein Walter N. Haldeman, Reuben T. Durrett, and James V. Escott are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable N. Clifford, associate justice of the Supreme Court of the United States, this 22d day of October, in the year of our Lord 1873, and of our Independence the 98th.

BLAND BALLARD.

19 I hereby accept service of the within this 28th day of October, 1873.

G. C. WHARTON,
U. S. Att'y Ky. Dis't.

Indorsed: 1779. United States vs. W. N. Haldeman et al. Citation.

(Indorsement on cover:) No. 392. Walter N. Haldeman, Reuben T. Durrett, and James V. Escott, plaintiffs in error, vs. The United States. Kentucky C. C. U. S. Filed 13 March, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1875.

W. N. HALDEMAN, &c., Plaintiffs in Error,

VERSUS

THE UNITED STATES, Defendant in Error,

BRIEF FOR PLAINTIFFS IN ERROR.

HARLAN & WILLSON, Counsel.

COURIER-JOURNAL PRINT.

Supreme Court of the United States

OCTOBER TERM, 1875.

W. N. HALDEMAN &c., Plaintiffs in Error,

vs.

THE UNITED STATES, Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

On the 25th of June, 1858, W. N. Haldeman, with Escott and others as his sureties, executed to the United States his bond in the penalty of fifty thousand dollars, conditioned for the faithful discharge of his duties as Surveyor of Customs at the port of Louisville, in the State of Kentucky, and also as designated Depositary to receive money due the United States.

In the year 1861, Haldeman ceased to be Surveyor of Customs and Depositary, and on the 30th day of August, 1870, this suit was commenced against him and his sureties on the bond aforesaid.

The breaches of the bond assigned are as follows:

1. That Haldeman at the time of his removal from office in 1861 had in his hands the sum of $2,410 92, being for moneys received by him as Depositary of the public moneys of the United States, and for moneys received by him as Surveyor of customs in the port of Louisville,

and steamboat fees, no part of which have been paid or accounted for by him to the United States, although the sum thus alleged to be due had been often demanded by the United States.

2. That, upon the settlement of the accounts of the said Haldeman, made by the proper accounting officer of the Treasury Department, on the 24th of August, 1866, there was found due and owing from him the sum of $2,410 92, no part of which sum has been paid.

Plaintiffs in error filed four pleas in bar of the action, the substance of which is as follows:

1. That the United States on the 18th of November, 1861, in the same Court impleaded the same defendants for and respecting the same identical cause of action, and such proceedings were had that subsequently, on the 17th of June, 1863, "by the consideration and judgment of this Court, and on motion of the said plaintiffs, said suit was dismissed upon payment to said plaintiffs by said defendants of the costs thereof, to-wit, the sum of $25 00; and thereupon, by the further consideration and judgment of this Court, it was adjudged that said suit was not prosecuted, as by the record and proceedings thereof still remaining in this Court more fully and at large appears, and which said judgment still remains in full force and effect, not in the least reversed, modified or made void."

2. That on the 18th of November, 1861, the United States exhibited and filed their declaration in debt against the plaintiffs in error for and in respect of the same identical cause of action as the declaration now exhibited and filed. And such proceedings were had in this Court that subsequently, on the 17th of June, 1863, "the said plaintiffs received and accepted from said defendants the sum of $25 00, lawful money of the United States, in full

payment and discharge of the costs of said suit, and thereupon, on motion of said plaintiffs, and by the consideration and judgment of this Court, it was adjudged and ordered that the said suit was not prosecuted, that the same be dismissed, as by the records and proceedings still remaining in this Court more fully and at large appears, which said judgment and order remains in full force and effect, not in the least reserved, modified or made void."

3. The plaintiffs in error, for further plea, said that the United States ought not to have and maintain its aforesaid action against them, "because, they say, that heretofore, to-wit, on the 18th day of November, in the year 1861, the said plaintiffs impleaded the said defendants in a certain plea of debt in this Honorable Court for the detaining and not paying the very same identical debt, and for and in respect of the same identical cause of action in the said declaration mentioned, and thereupon such proceedings were had that afterwards, to-wit, on the 17th of June, in the year 1863, *by the judgment of this Court* said suit was *dismissed agreed*, as by the records and proceedings still remaining in this Court more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed or modified."

4. That on the 18th day of November, 1861, the United States, in the same Court, impleaded the plaintiffs in error herein for and in respect of the same identical cause of action in said declaration mentioned, and also then and there the said United States impleaded the said plaintiffs in error in another certain plea of debt for and in respect of another and different cause of action; "and thereupon such proceedings were had in this Court that afterwards, to-wit, on the 17th of June, 1863, by the consideration and order of this Court, the following judg-

ment was rendered, to-wit: 'This day came Joshua Tevis, Esquire, Attorney for the United States, and stated to the Court that he was instructed by the Solicitor of the Treasury to dismiss the above two cases on the payment of costs herein by the defendants, and the clerk having taxed the costs at twenty-five dollars in each case, and the Marshal having acknowledged payment thereof, on the motion of said attorney it was ordered that these cases be, and the same were hereby dismissed. It is therefore considered by the Court that these suits are not prosecuted,' as by the records and proceedings still remaining in this Court fully and at large appears, which said judgment still remains in full force and effect and unreversed."

A demurrer was filed to each of the pleas upon the ground that they were not sufficient in law to bar or preclude the United States from maintaining its said action.

The demurrers were sustained, and the plaintiffs in error assigning nothing further in bar or preclusion of the demand sued for, judgment was rendered against Haldeman and his sureties for $3,446 40 damages.

ERRORS.

The plaintiffs in error insist that the Court below erred:

1st. In sustaining the demurrers to the several pleas.

2d. The Court below should have overruled the demurrer as to each of said pleas.

POINTS.

We submit that each of the pleas was sufficient to bar the action.

The Court may properly consider the first, second, and fourth pleas together since the sufficiency of each of those pleas will depend substantially upon the same line of argument, and the same class of authorities.

Smith's Leading Cases, (p. 673) divides those judgments which are not a bar to another action into the following classes:

Where the plaintiff fails for the want of jurisdiction in the Court to hear his complaint, or to grant him relief; or where he has misconceived his action; or where he has not brought the proper parties before the Court; or where the decision was on demurrer, and the complaint in the second suit sets forth the cause of action in proper form; or where the first suit was prematurely brought; or where the matter in the first suit is ruled out as inadmissable under the pleadings. It may be conceded also that an order which simply shows dismissal by plaintiff's attorney does not constitute a bar. *Harris vs. Tiffany & Co.*, 8 *B. Mon.*, 225.

Especially where the order recited the fact that the note sued on was withdrawn by the plaintiff, the leave to withdraw implying that the dismission was not intended to operate as a permanent bar, or as an acknowledgment that the plaintiff had no cause of action. 8 *B. Mon.*, 226.

But the pleas under consideration present a state of facts which *do* imply an intention to end the litigation and from which it must be inferred, as a matter of law, that the United States acknowledged that it had no further cause of action on the bond sued on.

In the first plea it affirms that, by the consideration *and judgment of the Court*, and, on motion of the United States, the suit was dismissed upon payment to the United States of the costs, a benefit which could not

have accrued to the United States upon its voluntary dismissal of the suit with a purpose to renew it. And to add to the force of this position, it was adjudged by the Court that the suit "was not prosecuted."

In the second plea it appears that the United States accepted from the defendants $25 in full payment and discharge of the costs of the suit; and thereupon, as if no further claim was made by the United States, the Court, on the motion of the United States, adjudged that the suit "was not prosecuted, and that the same be dismissed," a result inconsistent with the supposition that the United States retired from Court with an intention to renew its suit. On the contrary, the order is consistent only with the other conclusion that the parties agreed to terminate their dispute by the defendants paying the costs. It can not be assumed that the defendants paid the costs of the first action in consideration of a mere temporary suspension of proceedings against them. Had such been the fact, there would have been some recital in the judgment to show it, and the order would have been simply an order of dismissal. The Court goes beyond that, and adjudges that the action was not prosecuted.

It will not be disputed that it was entirely competent for the parties to make the payment of the costs by the defendants the entire consideration for the termination of the litigation. *Harper vs. Graham*, 20 *Ohio*, 105.

In plea four, it is stated that the District Attorney was instructed by the proper authority at Washington to dismiss the former action upon payment of costs. The costs were taxed and paid, and the fact of payment entered upon the record. Thereupon, on motion of the attorney for the United States, the action was dismissed,

and "it is, therefore, considered by the Court that those suits are not prosecuted."

We confidently submit that each of the pleas, one, two and four, present a case of *retraxit*, or orders of dismission, which are equivalent to orders of *retraxit*.

"Retraxit is where a plaintiff cometh in person in Court where his action is brought and saith he will not proceed on it." *Jacob's Law Dict., Title Retraxit.*

Bouvier says that it is the act by which a plaintiff withdraws his suit. 2 *Bouvier's Law Dict.*, 475.

Had the District Attorney appeared in Court, and in terms announced that the United States would not proceed in its action, or that the United States withdrew its suit, or that the United States would abandon its cause of action, if the defendant would pay the costs, it would not, in either case, have been more clearly a *retraxit* than is presented in pleas 1, 2 and 4. The Court did not of its own motion, and against the wish of the United States, dismiss the action upon any of the grounds recognized as not constituting a bar to a future action. But the United States, by its authorized officer, voluntarily announced to the Court that, if the defendants would do what they were not bound to do, pay the costs, it would dismiss the action. That condition precedent was complied with, the action was dismissed, without objection by the United States, and an entry of non-prosecution was made by the Court. The legal inference from these facts is that the parties by agreement terminated the dispute between them. If it be a case of *retraxit*, then the judgment in the former action is a peremptory bar. *Jacob's Law Dict., Title Retraxit;* 3 *Thomas' Coke*, 550; *Bacon's Abr. Nonsuit, A.; Harris vs. Tiffany*, 8 *B. Mon.*, 225.

2. But, if we should be mistaken in the positions we

have advanced in reference to pleas 1, 2 and 4, we submit that there is no ground whatever to doubt the sufficiency of the third plea. In that plea it is distinctly alleged that the former suit was identical with this, and was dismissed, *agreed, by the judgment of the Court.*

Such an order, according to the weight of authority, and upon principle, is a peremptory bar.

In the case of the Bank of *Commonwealth vs. Hopkins*, 2 *Dana*, 395, the Court of Appeals of Kentucky (Chief Justice Robertson) say:

"The legal deduction from a judgment dismissing a suit '*agreed*' is that the parties had, by their agreement, adjusted the subject matter of controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties, on the identical cause of action thus adjusted by the parties, and merged in the judgment rendered thereon at their instance, and in consequence of their agreement.

"If in such a case the original cause of action has not been actually extinguished by payment, or other actual satisfaction, but was only transformed, by the agreement of the parties, into a new cause of action, the remedy must be on the latter, and can not be maintained on the former and extinguished cause of action."

The same principle is announced in *Jarboe vs. Smsth*, 10 *B. Mon.*, 257; *Merrill vs. Campbell*, 47 *Cal.*, 545.

For like reasons it has been held that the withdrawal of a juror by consent was a bar to another action. *Gibbs vs. Ralph*, 11 M. & W., 805.

In considering plea 3, it should not be overlooked that the action is not dismissed agreed, on the motion of the United States, but by the court, upon its own motion. That judgment is still in force, and must be re-

garded as merging the claim of the United States in the agreement of the parties.

We submit, for the reasons stated, that the judgment should be reversed, with directions to overrule the demurrers as to each of the pleas.

HARLAN & WILLSON,

Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

WALTER N. HALDEMAN ET ALS., PLAINTIFFS IN ERROR, *vs.* THE UNITED STATES. } No. 157.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

WALTER N. HALDEMAN ET ALS., PLAINTIFFS IN ERROR, *vs.* THE UNITED STATES. } No. 157.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Brief for the United States.

For the purposes of this discussion we will follow the example of the plaintiffs in error, and treat the first, second, and fourth pleas as substantially the same.

I.

They merely state that the former action was non-suited; that is, this is all the *judgment* that they state. The preliminary recital of facts, as to payment of costs, &c., does not change the legal effect of the judgment actually rendered, which was, as given in the first plea, "that said suit was not prosecuted." This is nothing more or less than the record of a non-suit, and only

estops the original plaintiffs from saying that they did prosecute that action; it does not prevent the institution and maintenance of the subsequent suit. Judgment of non-suit is simply "blowing out of a candle which a man at his pleasure lights again." (Clapp *v.* Thomas, 5 Allen, 158.) There is not only an omission to aver that the non-suit was upon the merits, but it plainly appears that the merits were not considered; had they been, a judgment of non-suit, merely, would not have prevented a subsequent re-hearing; *a fortiori*, it cannot prevent one where none has been had. (Greeley *v.* Smith, 1 W. & M., 183; Derby *v.* Jaques, 1 Clifford, 425, 430–432; Knox *v.* Waldoborough, 5 Maine, 185; Homer *v.* Brown, 16 Howard, 354; Morgan *v.* Bliss, 2 Mass., 113; Bridge *v.* Sumner, 1 Pick., 371; Wade *v.* Howard, 8 Pick., 353; Howes *v.* Austin, 35 Ill., 396; Jones *v.* Walker, 5 Yerger, 428; Brintnall *v.* Foster, 7 Wendell, 103; Hollard *v.* Hatch, 15 Ohio St., 464; Taylor *v.* Larkin, 12 Misso., 103; Foster *v.* Wells, 4 Texas, 101; Pillow *v.* Elliott, 25 Texas Supp., 322; Allinet *v.* Creditors, &c., 15 La. An., 130.)

That the recital of the payment of costs, &c., are mere surplusage, and cannot affect the judgment of non-suit said to have been recorded. (See Derby *v.* Jaques, 1 Clifford, 430, 431; Homer *v.* Brown, 16 Howard, 354.)

But, to prevail, the plea should affirmatively state that the former judgment was upon the merits. (Greeley *v.* Smith, 1 W. & M., 183; Johnson *v.* White, 13 S. & M., 584.)

Non constat, either, that *all* the parties to the present suit *and none other* were party to the former.

That the dismissal was with the assent of the United States cannot make any difference. The plaintiff always

accedes, tacitly or avowedly, to a non-suit. If he fails to appear, he does so knowing that such failure will result in a dismissal; and he therefore as much consents to it as if done while he is present in open court. Indeed, against the will of the plaintiff, no circuit court has the power to order a peremptory non-suit. (Doe d. Elmore *v.* Grymes, 1 Peters, 469.) So, in every such case, he *agrees* to the dismissal. That he also virtually assents to a payment of costs by him, or consents to receive the costs and permit the dismissal, can make no difference, so long as it is only the dismissal of that particular action, and not the adjustment of the *cause* of action, that is embraced by the agreement of the parties.

II.

The third plea alleges that, in the former suit, such proceedings were had that the same was "dismissed, agreed." The other three pleas allege expressly, as a fact, that the money paid was given and received solely on account of costs only; negativing the idea that the United States had no cause of action, or that aught was done to release its claim or affect any adjustment of it. Had it been intended to merge or abandon that claim, judgment for a nominal sum, or satisfaction, would have been entered of record; this not being done is evidence of a purpose to preserve the right to institute new proceedings. How could this sealed instrument be merged in the judgment when it had not been made part of the record, and no finding was made with relation to it beyond the mere entry that upon payment of costs that suit was dropped?

The other pleas quote the language of the former

record, and it is apparent that it was not an entry of "dismissed, agreed," to which peculiar local effect seems to be given in the Kentucky State courts. Then, as the other pleas recite as the judgment, that the first suit was not prosecuted, while this one says it was dismissed, agreed, they are inconsistent and antagonistic. The allowance of double pleas is now generally discretionary with the court. (Ex. p. Davenport, 6 Peters, 661; Liter *v.* Green, 2 Wheaton, 308.) "At common law a defendant could not plead several distinct pleas to the same declaration," (1 Chitty on Pleading, 560;) but, by statute 4 and 5 Anne, ch. 16, §§ 4, 5, this was permitted "*with leave of court;*" this statute, however, Chitty says, *abi sup.*, "*did not extend to suits of the king;*" and upon the next page (561) he adds that where the king is party "the defendant cannot plead double without leave of the attorney-general." (Rex *v.* Caldwell, Forrest, Exch., 57; King *v.* Archbishop of York, Willes, 533.)

And even where such leave is had, which does not appear in this case, the pleas must neither amount to the general issue nor be palpably irreconcilable. (1 Chitty on Pleading, 561, 562; Tidd's Practice, 655; Jackson *v.* Stetson, 15 Mass., 54, 55.)

III.

Under the Kentucky code, § 115, the only course permitted the defendant is to demur or answer to the petition. These pleas must be construed to be answers, since they certainly are not demurrers; in which case they should have been verified by affidavit. (Code, § 142.)

Since they introduce new matter, of a traversable

nature, they should have been verified by affidavit, irrespective of the code. The identity of the parties and cause are such traversable facts. (White *v.* Whitman, 1 Curtis, C. C., 496.)

The demurrers admit only those facts well pleaded; and all facts relied upon should be fully stated. The alleged judgment should have been fully stated, or (at least) the term of court at which it was rendered, and such other facts as to completely establish its identity. (Whitaker *v.* Bramson, 2 Paine C. C., 209; United States *v.* Sawyer, 1 Gall. C. C., 86; Riddle *v.* Potter, 1 Cranch C. C., 288.)

These pleas are bad in that they neither deny nor admit and avoid the plaintiff's declaration, though they assume to set up new matter. Chitty says that a plea in bar "must contain either, first, a traverse or denial of the plaintiff's allegations; or, secondly, an express or implied admission that such allegations are true, with a statement of matter which destroys their effect. In other words, a plea in bar must *deny*, or *confess and avoid*, the facts stated in the declaration." (1 Chitty on Pleading, 525 *et seq.*) "Neither of these pleas deny the allegations of the declaration, nor do they admit and avoid them. The facts are pleaded in abatement, or, according to the form of the pleas, in bar of the plaintiff's action, without giving color to his right. This is a fatal defect." (Halstead *v.* Lyon, 2 McLean C. C., 231, 232.)

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